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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 118

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

A. The "Brief for Respondent in Opposition to Petition for Writ of Certiorari" presented by the Attorney General of Pennsylvania fails to comply, and could not comply, with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court".

Because the respondents represented therein claim (p. 7), "The interesting question of judicial immunity is not involved"; they necessarily admit that they do not have immunity. Furthermore, they failed to cite and could not cite any applicable authorities in opposition to the many authorities cited by your petitioner (pp. 14-15), all of which leave no doubt about the lack of immunity.

It is important to call the Court's attention to this point, because the only "defense" raised by their motion to dismiss in the District Court was immunity, the only issue adjudicated therein.

Thus they now completely rely upon the inapplicable, if existent, "principle" stated in the case of *Butcher & Sherrerd v. Welsh,* 206 F. 2d 259, etc., which the Court of Appeals was so ready, able and willing to misapply, so that said court could continue its expressly refraining from adjudicating the issue of immunity,—the only issue herein properly before that court. The inapplicability herein of *Butcher & Sherrerd v. Welsh* is adequately shown in Reason G for Allowance of the Writ (pp. 18-20).

Judging from numerous Records in the Court of Appeals, that court's biggest problem respecting your petitioner appears to be that the bigoted, prejudiced Circuit Judge William Henry Hastie would not consider a decision allowing your petitioner his federal constituional and civil rights; and the other Circuit Judges would not dare make a decision interfering with the federal constitutional and civil rights of Judge Hastie's constituents. Therefore, your petitioner must remain a victim of their joint suspended indecision,—unless this Honorable Court will come to his rescue by making the decisions which the Court of Appeals should have made at the outset.

B. The brief in opposition presented by Attorney Elder W. Marshall fails to comply, and could not comply, with paragraph 1 of Rule 24 because it does not disclose "any m 'ter or ground why the cause should not be review this Court". Contrarily, it dwells mostly upon

State questions which are not involved herein, instead of upon the Federal questions which are involved herein and which make this a cause of public importance.

Your petitioner tried to explain that error of Attorney Marshall's ways to him in italics in the petition (p. 6), in order to avoid the anticipated repetition of it. Nevertheless, Attorney Marshall misrepresented the Amended Complaint as though your petitioner were taking an appeal to the District Court from the Pennsylvania Supreme Court instead of suing in the District Court for deprivations of Federal rights perpetrated in the Pennsylvania Supreme Court.

Elder W. Marshall, Esquire, overlooked or misapprehended, as did the Court of Appeals, the following pertinent allegations of the Amended Complaint (R. 11a in appeal No. 12,052), admitted to be true for purposes herein:

"12. Defendants by their said conspiratorial actions have unlawfully discriminated against plaintiff, and have deprived plaintiff of the exercise of his rights and privileges as a citizen of the United States.

"13. The said combined, conspiratorial actions of the defendants deprived plaintiff of important rights under the Constitution and laws of the United States, particularly his right to due process of law which assures him his right to a day in court; and his right to the protection of the Civil Rights Acts. Defendants by their thus impeding, hindering, obstructing and defeating the due course of justice, did unlawfully deprive plaintiff of his rights thereunto appertaining.

"14. By reason of the said combined and conspiratorial actions and agreements of defendants as afore-

said, plaintiff has been injured in his right to earn a living and in his professional standing in the Court of Common Pleas of Allegheny County, Pennsylvania and in the Supreme Court of Pennsylvania; and has suffered loss of prestige and good will, and has been damaged personally and professionally."

It is respectfully submitted that no matter what Attorney Marshall argues or what the Court of Appeals opines, not a word of petitioner's pleadings can be changed thereby; nor can the Federal Rules of Civil Procedure thus be changed, or the Law of the Land.

Because the Order of the District Court denying the motion for leave to file the Amended Complaint was based solely on an erroneous view of the law of immunity, and not in the exercise of discretion, it should be reversed. Further the discretion, if any, of the District Court was not reviewable except on the issue of immunity.

When it was held at the outset that Bolsinger should not be a defendant because he would be fired if he did not take all such Orders from Chief Justice Horace Stern no matter how "violative of basic concepts of justice", your petitioner agreed with that as a "finding of fact" but disagreed with it as a "conclusion of law." Accordingly, in the Amended Complaint, when adding the Associate Justices of the State Court as defendants, Bolsinger was dropped as a defendant. Nevertheless, his Attorney Marshall does him the disservice of maintaining him as a defendant-respondent.

Replying to respondents' impertinent **Argument I** (pp. 6-7), it is refuted that the right to practice law is merely a privilege. It is elementary that it is a privilege to become admitted to the Bar, but that upon admission, the applicant becomes vested with a right to practice law,—a federally secured right. See points and authorities in the petition (pp. 13-14), any discussion of which or opposition thereto was so studiously avoided by the respondents.

An examination of the (erroneously impounded) Petition presented to the Pennsylvania Supreme Court at No. . . . Miscellaneous Docket, In Re: Louis Caplan, et al., Members of the Bar, will disclose that your petitioner followed all Rules of Court and Rules of Procedure, including the footnoted (pp. 6-7) Rule 17(d), cited by respondents. It was the actions of respondents in connection therewith that were characterized by Chief District Judge Gourley as being "violative of basic concepts of justice".

Counsel's labeling the complainant (petitioner) in a disciplinary proceeding as "simply an informer" is an impudent misrepresentation of the Office of Attorney and a violation of the Canons of Professional Ethics. Actually, such a complainant is exercising the rights and duties of members of the bar:—

In *People ex rel. Colorado Bar Ass'n. v. Class,* 201 P. 883, 70 Colo. 381, (1921) the Court held, p. 884:

> "It is the privilege, if not the duty, of every attorney to call to the attention of this Court any act of a licensed attorney which may fairly be considered to disqualify him. Calling attention to

breaches of professional duty should be encouraged, rather than denounced, and it is only by the exercise of constant vigilance on the part of the members of the bar that the profession may be kept up to that high standard which should characterize it."

In *State ex rel. Fletcher v. Hunter et al.*, 276 S.W. 639, 152 Tenn. 233 (1925), the Court held, p. 640:

"Each individual member of any local bar, in the same sense as any group of members of a bar acting as a committee, or association, is 'aggrieved' by the professional misconduct of any other member of his bar. Such misconduct reflects upon and shadows the standing of the bar and profession as a whole, and impairs the standing and usefulness of the profession and of all its members. These are matters in the realm of ethics, and hard and fast rules applicable to tangible rights and wrongs do not apply. One may be 'aggrieved' in the sense contemplated by this statute without having suffered a direct individual injury. It is sufficient that he is a member of a class in this case a profession, whose standing before the public, which should be zealously guarded, has been adversely affected, and which has been, therefore, 'aggrieved'."

Replying to respondents' erroneous **Argument II** (pp. 7-10), it exhibits (p. 8) an unawareness of when an action is ripe for certiorari as well as a lack of knowledge that there is no prescribed time within which to proceed under the All Writs Act. Furthermore, the asseveration that there has been a conclusive judgment herein since June 3, 1955, contradicts the agreement entered into long after that date between your petitioner and Attorney Elder W. Marshall (Petition, p. 10) "to

await the determination of the other case referred to in section A of this Statement". Attorney Marshall denied this agreement in his Brief for Appellees in the Court of Appeals at No. 12,765; and consequently your petitioner, in his Reply Brief for Appellant therein, printed copies of correspondence between him and Attorney Marshall which established the said agreement.

Counsel's arguing on the point of *res judicata* is insupportable and untenable. Even if he were correct in his position thereon, that could never help him establish his impossible burden of convincing this Honorable Court that this "suit no longer pends". Therefore, the lower courts were not justified in allowing his attachment execution on your petitioner's bank accounts for costs herein.

Replying to respondents' unsupported **Argument III** (pp. 10-11) their citations are not authority for the propositions and the propositions contain no legal opposition to the petition for writ of certiorari. No matter how the respondents try to twist the record facts and turn the applicable Rules, there can be no question that Rule 15 (a) applies. Reason E for Allowance of the Writ (p. 17) contains the unopposed authorities. Even the Court of Appeals tired of the cases cited by respondents, and relied solely in its Opinion (App. 3-5) upon the one inapplicable case of *Butcher & Sherrerd v. Welsh*.

Consideration of the proceedings and appendices in the instant appeal at No. 12,765 as well as the prior appeals at Nos. 11,499 and 12,052 which are embraced thereby, should convince this Honorable Court of the need for review herein.

The said respondents have unnecessarily appended (12-17) what they themselves label an "Unpublished Oral Opinion of the Court". This so termed "Unpublished Oral Opinion of the Court" amounts to nothing more than an excerpt from the Transcript of Official Notes of Proceedings. Aside from the point that it does not qualify as an Appendix, it was previously printed unnecessarily by these respondents for "use" of the Court of Appeals as an Appendix to their Brief therein; and, therefore, it has already been filed herein as experienced practitioners would know and as counsel has been notified by your petitioner. When this Honorable Court reads it, the Court can evaluate it for what it is worth.

ADDENDA

In both actions involved in this petition, trial by jury was demanded. The orders entered by the lower courts unlawfully deprived your petitioner of his right to trial by jury. This deprivation should be corrected in the light of this Court's recent decision (May 25, 1959) in the case of *Beacon Theatres, Inc., v. Hon. Harry C. Westover,* 78 S. Ct. 948. Mr. Justice Black, who delivered the Opinion of the Court, stated, pp. 951-2, "Petitioner, Beacon Theatres, Inc., sought by mandamus to require a district judge in the Southern District of California to vacate certain orders alleged to deprive it of a jury trial of issues arising in a suit brought against it by Fox West Coast Theatres, Inc. The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying petitioner's request for a jury. 252 F. 2d 864. We granted certiorari; 356 U.S. 956, 78 S. Ct. 996, 2 L.

Ed. 2d 1064, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'. *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 296, 301, 79 L. Ed. 603." In reversing the Court of Appeals, Mr. Justice Black concluded (p. 957), "Respondent claims mandamus is not available under the All Writs Act., 28 U. S. C. sec. 1651, 28 U. S. C. A. sec. 1651. Whatever difference of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled".

CONCLUSION

The weaknesses in the briefs filed on behalf of the respondents emphasize the strength and accentuate the merit of the Petition. Actually, the respondents' briefs evade the petitioner's Reasons for Allowance of the Writs, and fail to disclose any legal opposition. Therefore, the petition for writs of certiorari should be granted.

Respectfully submitted,

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Dated: 25 August 1959.

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PETITION FOR REHEARING

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